89-351

No._____

IN THE

Supreme Court of the United States

October Term, 1989

TOWNSHIP OF KENNEDY,

Petitioner,

vs.

KENVUE DEVELOPMENT, INC.

and

KENVUE SERVICE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Counsel for Petitioner

Batavia Times Publishing Co.
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34 pp

Questions Presented

I. Whether the trial court's failure to grant petitioner an evidentiary hearing on its motion to disqualify counsel has deprived petitioner of due process?

II. Whether the Supreme Court of Pennsylvania by acquiescing in the use of the doctrine of laches by the trial court has thereby decided a question of substance in a way not in accord with applicable decisions of the Supreme Court of Pennsylvania and the United States Supreme Court?

List of All Parties to the Proceeding

1. Township of Kennedy
2. Kenvue Development, Inc.
3. Kenvue Service Company
4. Kennedy Township Municipal Sewage Authority

None of the listed parties are or have affiliates or subsidiaries.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Petitioner, Township of Kennedy, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this case on May 30, 1989.

Opinions Below

The Opinion and Order of the Court of Common Pleas of Allegheny County denying Kennedy Township's Motion to Disqualify is unreported and is printed in the Appendix hereto, pp. 4a-9a. The Order of the Court of Common Pleas of Allegheny County certifying that the denial of Kennedy Township's Motion to Disqualify involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may advance the ultimate termination of the case, is unreported and is printed in the Appendix hereto, at p. 3a. The Order of the Commonwealth Court of Pennsylvania denying permission to appeal is unreported and is printed in the Appendix hereto, at p. 2a. The Order of the Supreme Court of Pennsylvania denying Kennedy Township's Petition for Allowance of Appeal is unreported and is printed in the Appendix hereto, at p. 1a.

Jurisdiction

The Order of the Supreme Court of Pennsylvania denying the Township of Kennedy's Petition for Allowance of Appeal was entered on May 30, 1989, Appendix p. 1a.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Code of Professional Responsibility, Disciplinary Rule 9-101(B), adopted by the Supreme Court of Pennsylvania provides:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

The Code of Professional Responsibility, Disciplinary Rule 5-101(B), adopted by the Supreme Court of Pennsylvania provides:

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

The Code of Professional Responsibility, Disciplinary Rule 5-102, adopted by the Supreme Court of Pennsylvania provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The Code of Professional Responsibility, Ethical Consideration 9-3, adopted by the Supreme Court of Pennsylvania provides:

After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Statement of the Case

The Township of Kennedy ("Township"), a municipality located in Allegheny County, Pennsylvania, is a respondent together with the Kennedy Township Municipal Sewage Authority ("Authority") in a Petition filed by Kenvue Development, Inc. ("Kenvue Development") and Kenvue Service Company ("Kenvue Service") in the Court of Common Pleas of Allegheny County, Pennsylvania, to determine just compensation due as the result of an alleged *de facto* condemnation of their property.

Kenvue Development, Inc. acquired certain undeveloped property located in the Township of Kennedy in 1965. It developed the property into lots with single family homes without appropriate sewage treatment facilities. As a result, Kenvue Development was cited by the Pennsylvania Department of Environmental Resources for numerous violations of discharging raw sewage into the streams and tributaries which abutted its property. Subsequent to those citations, Kenvue Development urged the Township to apply for a temporary sewage treatment permit from the Pennsylvania Department of Environmental Resources which would allow Kenvue Development to operate a temporary sewage treatment facility to service the homes constructed by Kenvue Development on its property. A permit was granted to the Township of Kennedy—since permits were not permitted to private organizations such as Kenvue Development—upon the express condition that once Township sewers became available, the treatment plant would be abandoned and the Kenvue Service system would be interconnected with the Township system.

In 1975, the Kennedy Township Municipal Sewage Authority constructed a municipal sewer system for Kennedy Township pursuant to a Department of Environmental Resources permit. As a result of the conditions on the temporary permit granted to the Township which allowed Kenvue to operate a temporary sewage facility, the Department of Environmental Resources cancelled the sewage permit under which Kenvue Service operated and required, by a 1978 Order, that the Kenvue sewer system be connected with the Township system. This connection was to be effective on September 28, 1978.

On November 6, 1978, Kenvue Development and Kenvue Service filed a Petition for Appointment of Viewers to determine just compensation due alleging that the interconnection of its sewer lines with the Township lines was a *de facto* condemnation of Kenvue's property. The Township and the Authority filed Preliminary Objections in late 1978 which have not yet been decided.

During all of the proceedings to which the Department of Environmental Resources was a party, Richard S. Ehmann was Senior Litigator for the Department of Environmental Resources and directly represented that state agency in its successful attempt to have the temporary sewage permit revoked and Kenvue interconnect its lines with the newly created Township sewer lines.

During all of the proceedings involving the Department of Environmental Resources, the Township of Kennedy consulted, conferred and discussed with Mr. Ehmann the various strategies and courses of action regarding the Kenvue Development sewer system and the utilization of sewer lines running through Kenvue Development.

In January 1986, Mr. Ehmann left the Department of Environmental Resources and joined the firm of Hollinshead & Mendelson, counsel for both Kenvue Development and Kenvue Service. On July 24, 1987, Kennedy Township filed a Motion to Disqualify Hollinshead & Mendelson as counsel for Kenvue Development and Kenvue Service. Counter Motions to Disqualify Jubelirer, Pass & Intrieri, P.C. and Joseph J. Pass, were filed by Kenvue Development and Kenvue Service. All Motions to Disqualify were denied by an Order of Court of the Court of Common Pleas of Allegheny County, Pennsylvania, dated July 12, 1988. No evidentiary hearing was held prior to the denial of the Motions.

Kennedy Township thereupon filed a Petition for Permission to Appeal to the Commonwealth Court of Pennsylvania. It was in this Petition that Kennedy Township first raised the federal question of the due process requirement of hearing on its Motion. In its Petition to the Commonwealth Court of Pennsylvania, the Township raised the issue of the trial court's denial of the Township's due process by failing to hold an evidentiary hearing on its Motion for Disqualification.

The Township's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania raised anew the issue of deprivation of due process by the trial court's action. The Commonwealth Court of Pennsylvania denied the Petition for Permission to Appeal *per curiam* without an Opinion on October 13, 1988. Appendix at p. 2a. The Supreme Court of Pennsylvania denied the Petition for Allowance of Appeal in a *per curiam* Order without Opinion on May 30, 1989.

REASONS FOR GRANTING THE WRIT

I. The order from which petitioner appealed is a final order within the meaning of 28 U.S.C. §1257.

A judgment or decree of the state court must be final prior to review by the United States Supreme Court. Whether a state court judgment is subject to review by the Court on writ of certiorari is governed by the provisions of 28 U.S.C. §1257. *United States v. McDonald,* 435 U.S. 850 (1978), on remand, 585 F.2d 1211 (4th Cir. 1978), cert. denied, 444 U.S. 1091 (1979). Judgment must be rendered by the highest court of the state in which a decision could be had and only final judgments with respect to issues of federal law provide the basis for the Court's appellate jurisdiction. *New York Times Co. v. Jascalevich,* 439 U.S. 1317 (1978). It is a practical, as opposed to a technical, construction of the concept of finality which governs. *Cohen v. Beneficial Loan Corp.,* 337 U.S. 541, 546 (1948), cited in *Local No. 438 Construction and General Laborers Union v. Curry,* 371 U.S. 542, 549 (1963).

The Township of Kennedy's Motion to Disqualify was denied by the Court of Common Pleas of Allegheny County. Appendix, pp. 4a-9a. The Commonwealth Court of Pennsylvania denied the Township's Petition for permission to appeal Appendix, p. 2a, and the Supreme Court of Pennsylvania denied the Township's Petition for Allowance of Appeal from the Order of the Commonwealth Court. Although trial on the underlying issue in the Petition of Kenvue Development and Kenvue Service Company for the appointment of viewers to ascertain compensation due them arising from an alleged *de facto* condemnation of their properties in the Township remains, the Township's Motion to Disqualify Counsel falls "in that small class which finally

determined claims of rights separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Loan Corp.*, 337 U.S. at 546.

No further review of the issue of whether the Township will suffer deprivation of its due process rights based on the trial court's refusal to disqualify counsel is available by any state tribunal. The Township, by seeking permission to appeal the Order of the trial court to the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania, has exhausted all state procedures for review. The Order of the Supreme Court of Pennsylvania is a final determination of a critical federal question and review of that issue is not available in any state court. *Mississippi Power & Light Co. v. Mississippi*, _____ U.S. _____, 101 L.Ed.2d 322, 108 S.Ct. 2428 (1988); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947); *Department of Banking v. Pink*, 317 U.S. 264 (1942), rehearing denied, 318 U.S. 802 (1943); *Gorman v. Washington University*, 316 U.S. 98 (1942), rehearing denied, 316 U.S. 711 (1942).

The federal question at issue here is not the underlying issue in the Petition for Appointment of Viewers, it is rather whether the continued representation of Kenvue Development, Inc. and Kenvue Service Company by counsel who actively participated as a public employee in prior litigation and the refusal of the trial court to provide an evidentiary hearing on that issue, deprives the Township of Kennedy its due process rights. In the event that counsel for Kenvue Development, Inc. and Kenvue Service Company is permitted to continue in his

representation, the Township faces a trial on the merits which deprives it of its due process rights. The Township would thus be stymied by a rule from which it cannot appeal and be forced to proceed to hearing on the merits with this critical federal question still at issue. Should the parties proceed to trial with this issue outstanding, and should Petitioner ultimately seek review and prevail on the issue of whether counsel's continued representation of Kenvue Development and Kenvue Service is improper, the outcome of the proceedings would be so tainted as to require a new hearing. A determination of the Township's Motion to Disqualify Counsel, although a collateral federal issue, will ultimately determine the outcome of a hearing on the merits of Kenvue's Petition for Appointment of Board of Viewers. The decision on a federal question sought by the Township will not, therefore, prove to be unnecessary and irrelevant to the complete disposition of later pending litigation. To the contrary, it is intimately connected with and absolutely necessary to the complete disposition of the underlying litigation. *Hope v. Atlantic CLR Co.*, 345 U.S. 379 (1953).

The Order of the Supreme Court of Pennsylvania is, therefore, final within the meaning of 28 U.S.C. §1257, and subject to federal appellate jurisdiction.

II. The trial court's failure to grant petitioner an evidentiary hearing on its Motion to Disqualify Counsel has deprived petitioner of due process.

The Township of Kennedy faces deprivation of a property interest resulting from the representation of an adverse party by biased counsel. It faces this deprivation without the safeguard of a hearing prior to the deprivation. Kenvue Development, Inc. and Kenvue Service Company seek monetary relief from the Township for an alleged *de facto* condemnation of its property. The Township, by its Motion to Disqualify Counsel, seeks to prevent that significant taking of property, one which clearly falls within the protection of the Fourteenth Amendment. *Fuentes v. Sheven*, 407 U.S. 67 (1972). The Township and its officers are entitled to "due and regular process in the pleading, hearing, consideration and disposition of litigated claims." *Martin v. Neuschel*, 396 F.2d 759, 760 (3d Cir. 1968).

Because the Township contends that it is entitled to pre-deprivation process, its claim must be examined in light of three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail". *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Kenvue seeks recompense from the Township for the alleged condemnation of its property. The interest sought to be protected and which is affected by the failure of the trial court to provide a hearing is that of a municipality, one which is accountable to its residents for financial losses, losses which must be recouped by the

imposition of taxes upon those residents. To proceed to hearing on the merits of Kenvue's claim without the safeguard of fairness in judicial proceedings, seriously and immediately impacted upon its ability to defend itself against Kenvue's claim to the ultimate detriment of the residents of the Township.

The Township has also a fundamental right to fairness and judicial proceedings, a right which it was not accorded by the trial court since the Township had no opportunity to offer evidence and be heard on the issue of disqualification of Kenvue's counsel. The judicial proceedings in this matter will determine far-reaching and important rights of the Township, including the validity of an agreement made between the Township and Kenvue regarding interconnection of sewer lines to numerous residents.

The procedures utilized by the trial court were constitutionally inadequate to protect those important private rights. The trial court did not permit evidence to be submitted on the possibility of prejudice of Kenvue's counsel. The Township was not afforded the opportunity by the trial court to produce, through testimony, the extent of disputed counsel's participation on behalf of the Department of Environmental Resources and his close and continual involvement with the Township in the actions taken by the Department of Environmental Resources which preceded and led to the underlying litigation. The trial court, without the benefit of an evidentiary hearing, acted blindly when it ruled on the Motion to Disqualify. The risk of deprivation of a fair trial for the Township is thus extremely high. An evidentiary hearing would have greatly reduced this risk. The decision before the trial court was clearly rooted in questions of fact. Due process, therefore, mandates that the opportunity to confront and cross examine witnesses be afforded. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The deprivation of property faced by the Township must "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The Township was afforded no opportunity for hearing prior to the commencement of litigation on the underlying claim of Kenvue. Whatever the minimal due process requirements may be, none were afforded the Township, and at a minimum, the Township must be afforded the opportunity to present evidence to the trial court upon which it may fairly base its decision as to whether counsel's involvement in matters directly relating to this litigation preclude him under the Rules of Professional Conduct promulgated by the Pennsylvania Supreme Court from continuing his representation of Kenvue. The final factor to be considered under the *Eldridge* test, that is, the government's interest in minimizing the fiscal and administrative burdens that any additional procedural requirements would entail, *Id.*, at 335, is minimal compared with the harm faced by the Township. Although clearly the state has an interest in the efficient and expeditious resolution of claims, the burden upholding an evidentiary hearing at this point in the litigation is small when compared with the possibility that the entire trial would be tainted with the stain of biased counsel. If, for example, on subsequent appeal, it were to be determined that counsel should have been disqualified, a far greater burden on the judicial system will result as well as an extremely heavy burden on all parties if compelled to re-try the case.

The threat of deprivation of the property of the Township, and ultimately that of its citizens, in light of the trial court's failure to grant an evidentiary hearing when compared with the minimal state interest in avoiding such a requirement is worthy of review.

III. The Supreme Court of Pennsylvania by acquiescing in the use of the doctrine of laches by the trial court decided a question of substance in a way not in accord with applicable decisions of the Supreme Court of Pennsylvania.

Two opposing policies are at work in determining whether a Motion for Disqualification of Counsel can be barred by the doctrine of laches: preventing hardship on the client if counsel is sought to be disqualified, and preventing a continuing breach of the Code of Professional Responsibility. The Court of Common Pleas rendered the Opinion which the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania refused to review. That Opinion denied the Motion to Disqualify Counsel based solely on considerations of hardship to Kenvue. The Court of Common Pleas held that although there was no evidence of tactical motivation on the part of Kennedy Township in bringing the Motion it was brought late, and therefore, should be denied based on the harm to Kenvue.

The policy of preventing a breach of the Code of Professional Responsibility is equally important. In *American Dredging Co. v. City of Philadelphia*, 480 Pa. 177, 389 A.2d 568 (1978), the Pennsylvania Supreme Court rejected the notion that a Motion to Disqualify Counsel may be dismissed on the basis of timeliness:

> No specific rule of court governs the timeliness of a Motion to Disqualify based on alleged ethical violations of the challenged attorney. The court's responsibility cannot be defeated by the laches of the party seeking disqualification, at least where the Motion to Disqualify is made prior to the commencement of trial.

480 Pa. at 183, 389 A.2d at 571.

The Third Circuit has similarly held that a Motion to Disqualify may not be barred by the doctrine of laches. *Emle Industries, Inc. v. Glen Raven Mills, Inc.*, 478 F.2d 562 (3d Cir. 1973):

> Since, as we have noted, disqualification is in the public interest, the court cannot act contrary to that interest by permitting a party's delay in moving for disqualification to justify the continuance of a breach of the Code of Professional Responsibility. Accordingly, "the court's duty and power to regulate the conduct of attorneys practicing before it, in accordance with the cannons, cannot be defeated by the laches of a private party or complainant." *Empire Linotype School*, 143 F.Supp. at 631.

478 F.2d at 574.

The Township's Motion was made prior to the commencement of trial and, as the Court of Common Pleas observed, without evidence of tactical motivation.

The Cannons of the Code of Professional Responsibility in Pennsylvania have the force of statutory rules of conduct. *Commonwealth v. Eastern Dawn Mobile Home Park, Inc.*, 486 Pa. 326 (1979).

Counsel sought to be disqualified, Richard Ehmann, was a public employee representing the Pennsylvania Department of Environmental Resources and had substantial responsibility in the action which ordered the Township to interconnect its sewer system with the existing system located in the Kenvue Plan. In its Petition for Appointment of Viewers, Kenvue contends that the Department of Environmental Resources acted on behalf and/or in conjunction with the Township of Kennedy to deprive it of its property. The acts complained of are those of Mr. Ehmann.

> There is a significant risk that the interest the attorney represents as private counsel will conflict with the interest that he or she represented as a public employee. Such conflict or potential conflict results in impropriety or the appearance of impropriety which is a basis for disqualification of the attorney.

City of Philadelphia v. District Council 33, 503 Pa. 498, 502, 469 A.2d 1051, 1053 (1983).

There is a significant and real risk that the interest represented by Mr. Ehmann as private counsel for Kenvue will conflict with the interest he represented as counsel to a state agency. Mr. Ehmann was intimately acquainted with the facts and issues involved in the instant litigation as a result of his representation of the Department of Environmental Resources. Those facts, issues and actions directly led to the filing of Kenvue's petition seeking compensation.

The significant public interest and the scrupulous ethical administration of justice mandated by Cannon 9 of the Code of Professional Ethics would be violated by Mr. Ehmann's continued representation of Kenvue. The public interest was not accorded due weight by the trial court and is thus worthy of review.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JUBELIRER, PASS & INTRIERI, P.C.
By: Joseph J. Pass
JOSEPH J. PASS
219 Fort Pitt Boulevard
Pittsburgh, Pennsylvania 15222
(412) 281-3850
Counsel for Petitioner

APPENDIX

Order of the Supreme Court of Pennsylvania, Western District

(SEAL)

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

801 City-County Building
Pittsburgh, PA
15219
(412) 565-2816

May 30, 1989

Joseph J. Pass, Esquire
JUBELIRER, PASS & INTRIERI, P.C.
219 Fort Pitt Boulevard
Pittsburgh, PA 15222

In Re: *Petition of Kenvue Development, Inc., etc., et al.*
Petition of: Township of Kennedy
No. 598 W.D. Allocatur Docket 1988

Dear Mr. Pass:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"May 30, 1989
Petition Denied
Per Curiam"

Mr. Justice Zappala did not participate in the consideration or decision of this case."

Very truly yours,

IRMA T. GARDNER
Irma T. Gardner
Deputy Prothonotary

ITG/dad
cc: Leonard Mendelson, Esq.
Joseph M. Kulik, Esq.
Honorable Raymond L. Scheib

Order of the Commonwealth Court of Pennsylvania

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 470 Misc. Dkt. No. 4

TOWNSHIP OF KENNEDY,

Petitioner,

v.

KENVUE DEVELOPMENT, INC., a Pennsylvania corporation, et al.,

Respondents.

ORDER

PER CURIAM

NOW, October 13, 1988, upon consideration of petitioner's petition for permission to appeal and the brief in opposition thereto, said petition is denied.

CERTIFIED FROM THE RECORD
AND ORDER EXIT
OCT 14 1988
C.R. Hostutler
Deputy Prothonotary—Chief Clerk

Order of Court of the Court of Common Pleas of Allegheny County, Pennsylvania

Exhibit "A"

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 78-26458

PETITION OF KENVUE DEVELOPMENT, INC., a Pennsylvania corporation, and KENVUE SERVICE COMPANY, a Pennsylvania corporation, FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE JUST COMPENSATION DUE PETITIONERS ARISING FROM THE *DE FACTO* CONDEMNATION OF THEIR PROPERTIES IN THE TOWNSHIP OF KENNEDY.

ORDER OF COURT

AND NOW, to-wit, this 23rd day of August, 1988, based upon the within Motion, it is hereby ORDERED that this Court's Interlocutory Order of July 12, 1988, involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of this case.

BY THE COURT:

SCHEIB, *J.*

Opinion and Order of the Court of Common Pleas of Allegheny County, Pennsylvania

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

No. 78-26458

PETITION OF KENVUE DEVELOPMENT, INC., a Pennsylvania corporation, and KENVUE SERVICE COMPANY, a Pennsylvania corporation, FOR THE APPOINTMENT OF VIEWERS TO ASCERTAIN THE JUST COMPENSATION DUE PETITIONERS ARISING FROM THE *DE FACTO* CONDEMNATION OF THEIR PROPERTIES IN THE TOWNSHIP OF KENNEDY.

OPINION and ORDER OF COURT—DENYING ALL THREE MOTIONS FOR DISQUALIFICATION & PERMITTING ALL PARTIES TO RETAIN THEIR COUNSEL

SCHEIB, *J.*

Code _____

Copies of opinion & order sent to:

Joseph J. Pass, Esquire
Leonard M. Mendelson, Esquire
Joseph M. Kulik, Esquire

OPINION

SCHEIB, *J.*

This condemnation case has become a battle of disqualifications. Kennedy Township, represented by Joseph Pass and his firm of Jubelirer, Pass & Intrieri, wants to remove the firm of Hollinshead and Mendelson from its representation of Kenvue Development, Inc. The Kennedy Township Municipal Sewage Authority, represented by Joseph M. Kulik and his firm, King & Kulik, also wants to remove Hollinshead and Mendelson from its representation of Kenvue Development, Inc. Kenvue Development, Inc., represented by the firm of Hollinshead and Mendelson, wants to remove Joseph M. Kulik and the firm of King & Kulik from their representation of the Kennedy Township Municipal Sewage Authority.

Kennedy Township traces the activity of the Department of Environmental Resources in the present case, beginning with citations issued to Kenvue Development by the Department for dumping raw sewage into streams along its property. At Kenvue's urging, the Township applied to the Department of Environmental Resources for a sewage permit. The Department also approved a sewage needs plan completed by the Township. In 1978, the Township sewage plan was completed, and the Department directed Kenvue to abandon its sewage system and join the Township's.

During these proceedings, Richard S. Ehmann actively represented the Department of Environmental Resources. He now is a member of the Hollinshead and Mendelson firm. This leads Kennedy Township to argue that a lawyer should not accept employment in a matter

where he could be called as a witness. Disciplinary Rule 5-101(B). Kennedy Township argues that Ehmann was well aware that he might be called as a witness, and that mere possibility ought to disqualify him.

Kennedy Township cites Disciplinary Rule 9-101(B) too. That Rule directs a lawyer who enters private practice after working as a public employee not to accept work in a matter that he was substantially responsible for as a public employee.

Hollinshead and Mendelson argues that none of Ehmann's testimony would be contested or necessary. The firm sent notice of Ehmann's employment directly to Joseph Pass, yet this Motion for Disqualification was filed 17 months later. The firm maintains that even though he works for Hollinshead and Mendelson, Richard Ehmann has had nothing to do with this litigation. He has been screened from participation.

Disqualifying Hollinshead and Mendelson would work a hardship on Kenvue Development, Inc. The Eastern District Court stated that a late motion to disqualify would impose much hardship on the client. *Freeman v. Kulicke & Soffa Industries*, 449 F.Supp. 974 (E.D. Pa. 1978). The same situation exists here. To ask Kenvue to procure new counsel would hinder their interests in this matter; it is not in the best interests of justice.

Kennedy Township brought this motion late. The Eastern District Court warned of tactical motivations in bringing a disqualification motion close to the hearing of the underlying matter in the case. There may have been no tactical motivation in this instance, but little explanation is offered to state why, if Ehmann's new employment would prejudice Kennedy Township, Kennedy Township waited 17 months to file the motion

and to recognize a conflict. If no conflict had arisen during the intervening 17 months, why would one suddenly exist?

Vague assertions of prejudice will not serve to disqualify. *Freeman, supra; Kroungold v. Triester,* 521 F.2d 763 (3d Cir. 1975). The prejudice that Ehmann's testimony would produce must be demonstrated, but Kennedy Township has failed to do so. "Where the contention of the movant that prejudice will or may result from the testimony of counsel or a partner is rebutted by an assertion of opposing counsel that that testimony will not or may not be prejudicial, the movant's assertion is not sufficient grounds for disqualification, at least where the motion is made long after the initiation of discovery and shortly before trial." *Freeman* at 976. The Comment on D.R. 5-102(B) written by the Special Committee for the Evaluation of Ethical Standards warned that it "was not designed to permit a lawyer to call opposing counsel as a witness and thereby disqualify him as counsel." *Kroungold* at 766. Kennedy Township has not outlined any specific prejudice, and Kenvue has contended that Ehmann's testimony is unnecessary in the condemnation matter.

Kenvue has stated that Ehmann has had nothing to do with this case, that the firm has screened him from involvement in the matter. Screening in matters such as this one is an acceptable procedure. It has been approved by the U.S. Court of Claims. *Kesselhaut v. United States,* 555 F.2d 791, 214 Ct. Cl. 124 (1977). "We share the view expressed in the above-mentioned Formal Opinion 342 that an inexorable disqualification of an entire firm for the disqualification of a single member or associate, is entirely too harsh and should be mitigated by appropriate screening such as we now have here,

when truly unethical conduct has not taken place and the matter is merely one of the superficial appearance of evil, which a knowledge of the facts will dissipate." See also *Central Milk Producers Co-op v. Sentry Food Stores, Inc.*, 573 F.2d 988 (8th Cir. 1978); *Kadish v. Commodity Future Trading Commission*, 553 F.Supp. 660 (N.D. Ill. 1982).

The Sewage Authority argues that Ehmann's testimony will be important, and cites facts from Hollinshead and Mendelson's Motion to Disqualify Joseph Pass and his firm that seems to point to someone who had much familiarity with the case: Mr. Pass's intense pressure on the Department of Environmental Resources; Mr. Pass's 30 trips and 200 telephone calls to the Department; Mr. Pass's role in revoking the sewage permit.

The Kennedy Township Municipal Sewage Authority has also failed to demonstrate the importance of Richard Ehmann's testimony, despite the introduction of facts that could have been culled in other ways. These facts pertain to the controversy surrounding the sewage permit, not the condemnation case. The possibility of reward would not implicate Ehmann; the firm of Hollinshead and Mendelson has established procedures to screen Ehmann from involvement in this case. A Motion to Disqualify may be brought at any point in the proceedings when an impropriety is discovered, but the Authority has not shown why the impropriety, discovered 17 months after Ehmann joined the firm, could not be discovered when he joined the firm.

To dismiss the entire firm would work an injustice to Kenvue and it would not be in the interests of justice. As long as Hollinshead and Mendelson maintains its screening, it should be permitted to continue as counsel for Kenvue.

Hollinshead and Mendelson argues what was argued by Kennedy Township: namely, that since Peter King is listed as a witness by the Township and the Authority and Kenvue, he should not be permitted to act as counsel and neither should his firm, King & Kulik.

King & Kulik argues that Peter King was listed as a matter of course; there is little likelihood that he will actually be called to testify, though. His listing is also regarded by King & Kulik as a mistake; a poor one, yes, but a mistake.

The Motion to Disqualify King & Kulik brought by Hollinshead and Mendelson is also denied. This motion was brought after the motions for disqualification brought by Kennedy Township and the Kennedy Township Municipal Sewage Authority, so that it has the smell of a retaliatory motion. This motion should be denied because there are no specific prejudices enumerated that would be caused by Mr. King's testimony; there is no likelihood that he will be called anyway. King & Kulik has contradicted the assertion by Hollinshead and Mendelson that King's testimony will be important.

All three motions for disqualifications are denied and all parties are hereby permitted to retain their present counsel.

ORDER OF COURT

SCHEIB, *J.*

AND NOW, to-wit, this 12th day of July, 1988, this Court denies all three motions for disqualification and permits all parties to retain their present counsel.

BY THE COURT:

SCHEIB, *J.*

(2)

89-351

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

TOWNSHIP OF KENNEDY,

Petitioner,

vs.

KENVUE DEVELOPMENT, INC. and
KENVUE SERVICE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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24 pp

Counterstatement of Questions Presented

I. Whether denial of a Motion for Disqualification of Counsel is entitled to immediate review?

II. Whether due process required an evidentiary hearing before the decision not to disqualify Hollinshead and Mendelson as counsel for Kenvue Development, Inc. and Kenvue Services Company could be rendered?

III. Whether the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania recognized that the lower Court properly denied the Township's Motion and did not base its decision solely on the Doctrine of Laches?

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COUNTERSTATEMENT OF THE CASE

Procedural History

On November 6, 1978, Kenvue Development, Inc. and Kenvue Service Company filed a Petition for Appointment of Viewers to ascertain the just compensation due as a result of the *de facto* condemnation of their properties in the Township of Kennedy and a Board of Viewers was appointed. The Township of Kennedy ("Township") and the Kennedy Township Municipal Sewage Authority ("Authority")

filed Preliminary Objections, without Briefs, in late 1978. Counsel for Kenvue Development, Inc. and Kenvue Service Company filed a Petition for Evidentiary Hearing. On March 20, 1984, this case was assigned to the Honorable Maurice Louik. Those Preliminary Objections have not been decided and an Evidentiary Hearing was scheduled for July 28, 1987 before the Honorable Judge Louik.

On July 24, 1987, the Township of Kennedy filed a Motion to Disqualify the law firm of Hollinshead and Mendelson. On July 27, 1987, a Brief in Support was filed. This Motion was joined by the Kennedy Township Municipal Sewage Authority by filing a Memorandum of Law in support of the Township's Motion on August 3, 1987. Counter-Motions to Disqualify and Briefs were filed on behalf of Kenvue Development, Inc., and Kenvue Service Company. As a result, no evidentiary hearing was held on July 27, 1987. This case was reassigned to the Honorable Raymond L. Scheib by Order of August 3, 1987, and a Conciliation Conference was held on the matter.

By Order dated July 12, 1988, Judge Scheib denied all Motions for Disqualification. In response to the Township's Petition for Permission to Appeal an Interlocutory Order, Judge Scheib entered an order dated August 23, 1988 that the Interlocutory Order of July 12, 1988 involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this case. The Township's Petition for Permission to Appeal to the Commonwealth Court of Pennsylvania was denied *per curiam* on October 13, 1988. The Township's subsequent Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on May 30, 1989. This Petition for Writ of Certiorari follows.

Factual History

Contrary to the statement of the case set forth by Kennedy Township, the action of Kenvue Development, Inc. and Kenvue Service Company for just compensation did not arise as a result of a Department of Environmental Resources order, but as a result of the actions of Kennedy Township and the Authority. In 1965, Kenvue Development, Inc. acquired a large tract of undeveloped farm land in Kennedy Township which stretches several thousand feet from a paved road near the crest of a hill down a hillside to a valley and an unnamed tributary of Moon Run. Kenvue Development, Inc. began single-family home developments in successive phases, starting near the paved road and working down the hillside. The first phase, Kenvue Plan of Lots No. 1, included 25 lots starting near the paved road. To service those lots, Kenvue Development, Inc. constructed a private sewage system completed in December 1971. This system, constructed outside of Kenvue Plan of Lots No. 1, was comprised of a long trunk line running down the hillside several thousand feet and a complete sewage system of trunk lines, manholes, storage tanks, filtration plant, settlement pond and chemical treatment station constructed at the bottom of the hillside near the stream. The sewer line, along with its treatment facilities, was laid across Kenvue Development, Inc. property outside the subdivision plans.

The Township of Kennedy applied to the Department of Environmental Resources for a sewage permit for this sewage treatment plant, and Permit No. 0271441 was issued on September 27, 1971, so that the facility could be placed into operation by Kenvue Service Company.

Kenvue Service Company was organized in 1972 and is the owner of sanitary sewer rights-of-way, storm drainage rights-of-way, sewer pipes, manholes, a sewage treatment plant and tanks and appurtenances located on the land owned by Kenvue Development, Inc. Kenvue Service Company also had a Certificate of Public Convenience, issued on December 13, 1972 by the Pennsylvania Public Utility Commission, allowing it to operate a sanitary sewer service.

On November 12, 1971, the Township adopted the Allegheny County Comprehensive Sewage Needs Plan 1970-2000 in order to provide sewage treatement to a large part of the Township. The Authority obtained a Department of Environmental Resources permit, No. 0272427, issued on June 11, 1973, to construct a municipal sewer system.

L. Robert Kimball, Consultant Engineers, engaged by the Authority, incorporated Kenvue Development, Inc. and Kenvue Service Company's privately owned trunk line into the design of the Kennedy Township municipal sewer system, interconnecting a section of the municipal system with the private system. This was to allow sewage effluent from nearby areas of the Township outside the Kenvue plans to enter into and pass through the private system to reach a new ALCOSAN intercepter line constructed in the stream valley.

In December 1975, the Authority's contractor entered into Kenvue Development, Inc. and Kenvue Service Company's property and drilled a hole into a manhole, connecting the municipal sewage system with the private sewage system. After protest, the contractor disconnected the municipal system from the private system. However, on March 31, 1976, the Authority's contractor again entered the property and, at a different

manhole, connected the municipal system to the private system. Kenvue Development, Inc. and Kenvue Service Company again protested and the contractor again disconnected the system.

On December 9, 1976, the Authority adopted Resolution 4-76 which authorized condemnation of sewer lines, storm drainage lines, manholes and treatment facilities owned by the Kenvue Service Company and provided for connection of the municipal system to the private system. The Resolution also authorized condemnation of certain land to provide a right-of-way enabling the Authority to connect to Kenvue Service Company's manholes. To acquire those necesary easement rights near the top of the hillside, on January 3, 1977, the Authority filed an eminent domain proceeding at No. GD77-0002 against Kenvue Development, Inc. and Kenvue Service Company and others.

Following the filing of Preliminary Objections at No. GD77-0002, the parties entered into a stipulation that no physical connection would be made by the condemnor and no sewage would flow into the facilities of Kenvue Service Company, including but not limited to lines, manholes and sewage disposal plant, and specifically into manholes behind Lots 16 and 22 in the Kenvue Acres Plan No. 1. Further, the stipulation provided that the condemnation was not intended to condemn any interest of Kenvue Service Company in its sewage disposal system, including but not limited to lines, manholes and sewage disposal plant.

On March 24, 1977, the Township enacted Ordinance No. 178 establishing Sewer District No. 6 of the Township of Kennedy and, *inter alia*, empowering the Commissioners and Township officers to take all steps

and incur the necessary expenses to negotiate with "... both private and public companies or corporations, for the furnishing of and supplying of sewage transportation and collection to the said sewer district and the acquisition of any sewer lines contained within the said sewer district ..." and to provide all money as is or may be necessary to finance the project, "and if need be, to borrow such funds to be expended in said sewer district ...".

Ordinance No. 179, adopted by the Township on April 12, 1977, empowered the Township to do all necessary to acquire the sewage system within Sewer District No. 6, including entering into agreements with owners of property and recording any agreements with those owners of property.

Pursuant to this ordinance, the Township announced and convened a meeting of lot owners in the Kenvue Plan. The meeting was held June 22, 1977. However, certain officers of Kenvue Development, Inc. and Kenvue Service Company, who were record owners of a lot, and the resident son of one of the officers, were refused admission to the meeting of lot owners. The Township posted a guard at the entrance for the purpose of keeping them away while the meeting was conducted. At the meeting, the Township, the Board and the individual Board members advised the lot owners that the Township intended to acquire the sewage system owned and operated by Kenvue Service Company and further advised that this would be done without compensating Kenvue Service Company or Kenvue Development, Inc. for said acquisition. The Township also advised the lot owners that, unless they cooperated in the plan, the full cost of acquisition by purchase or eminent domain would have to be borne by the lot owners. The lot owners were

told that the sewer system could lawfully be acquired without compensating the owner; that the property of Kenvue Development, Inc., which surrounds the sewage system could lawfully be trespassed upon without incurring legal liability; that unless more than 50% of the lot owners served by Kenvue Service Company agreed to cooperate in acquisition under the provisions of the First Class Township Code, 53 P.S. §57415(e)(1), the entire cost of acquisition by eminent domain would be assessed against the lot owners and that, as a result, each lot owner would be required to pay an assessment in excess of $2,000; that the Township had offered to pay a purchase price of $33,000 for the sewage system and that the offer had been rejected; and that, if the lot owners did not cooperate in the plan, the sewage system would be ordered to close and the Township would cause the permit issued by the Department of Environmental Resources to be revoked, thereby depriving the lot owners of sanitary sewage service. The Township further advised those in attendance at the meeting that, within three weeks, a physical connection would be made between the Authority's sewage system and that of Kenvue Service Company.

After the meeting of June 22, 1977, the Township and the Authority prepared and mailed to each of the lot owners agreements which obligated the lot owners to cooperate in the plan to acquire the Kenvue Service Company sewage system and to trespass upon the property of Kenvue Development, Inc.

Thereafter, the Township approached the D.E.R. and requested that the sewage permit, which allowed Kenvue Service Company to operate, be cancelled. At the request of the Township, and without the consent of either Kenvue Development, Inc. or Kenvue Service Company,

the Department of Environmental Resources cancelled Permit No. 0271441, effective September 29, 1978. The Department of Environmental Resources, by an order dated August 17, 1978, required the "interconnection of the Kenvue Manor Plan sewers with the municipal sewer system . . . [by] no later than September 22, 1978", and further ordered that Kenvue Service's sewage treatment plant should be abandoned and an abandonment plan submitted to the Department of Environmental Resources by September 15, 1978. Kenvue Development, Inc., and Kenvue Service Company opposed the cancellation of the sewage permit, seeking a stay of the Order before the Environmental Hearing Board and Injunctive Relief in the Commonwealth Court of Pennsylvania. This opposition was unsuccessful.

The Order of the Department of Environmental Resources, however, does not prevent compensation to the petitioners for the taking of their property. In its transmittal letter accompanying the order, the Department of Environmental Resources explicitly states, "[n]othing in the order shall be construed to establish or modify the rights of any party with regard to any compensation for the value of the plant abandoned pursuant to the order". The Order itself further directs that the parties "initiate negotiations to provide for the interconnection" of the two systems. No such "negotiations" took place and, instead, the Township and the Authority took it upon themselves to effect the interconnection.

On September 27, 1978, the Township entered onto petitioners' property and completed physical connection of the Township's municipal sewer system into the private sewer system. By doing so, the Township circumvented the stipulation in the condemnation action

at No. GD77-00002. No Declaration of Taking was filed nor has just compensation been paid to Kenvue Development, Inc. or Kenvue Service Company.

After Kenvue Development, Inc. and Kenvue Service Company failed in their efforts to prevent the taking of their property, only one avenue remained open—an action seeking just compensation. This action was thus filed on their behalf by Hollinshead and Mendelson—the lawyers who had represented them in all of their previous efforts.

At the time that the Township sought the cancellation of sewage permit No. 0271441 and Kenvue Development, Inc., and Kenvue Service Company opposed cancellation, Richard S. Ehmann was Senior Litigator for the D.E.R. He was involved in the issuance of the cancellation Order and represented the D.E.R. before the Environmental Hearing Board and the Commonwealth Court of Pennsylvania. On January 2, 1986, Richard Ehmann left his position with the Department of Environmental Resources and joined the law firm of Hollinshead and Mendelson. An announcement of this new position was sent to counsel for the Township of Kennedy. On the eve of hearing, roughly 17 months after receiving notice that Richard Ehmann had joined the law firm of Hollinshead and Mendelson, the Township of Kennedy filed its Motion to Disqualify.

Summary of Argument

The interlocutory Order in question denying Petitioner's Motion for Disqualification of Counsel was not "final" and therefore was not entitled to immediate review. The Order, though granted without a hearing, did not violate due process when such hearing was neither necessary nor requested by Petitioner. Finally, Petitioner's Motion for Disqualification was properly denied when Petitioner waited 17 months for a strategically timely moment to file such motion, and when the prejudice to Respondents that disqualification of counsel would cause would heavily outweigh the unrealistic allegations of judicial unfairness raised by Petitioner.

REASONS FOR DENYING THE WRIT

I. Denial of a Motion for Disqualification of Counsel is not entitled to immediate review.

Under our appellate system, one has the right to appeal an order which is "final". *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949), adopted by the Supreme Court of Pennsylvania in *Bell v. Beneficial Consumer Discount Company*, 465 Pa. 225, 348 A.2d 734 (1975). However, the denial of a disqualification motion is a *not* final order. *Middleberg v. Middleberg*, 427 Pa. 114, 233 A.3d 889 (1967). In issuing its order denying the Petition for Permission to Appeal, the Commonwealth Court of Pennsylvania followed well established Pennsylvania precedent. There is no discrepancy in the way the Pennsylvania appellate courts handle orders refusing to disqualify counsel.

Two panels of the Superior Court of Pennsylvania grappled with the question of whether the adoption of the *Cohen* standard by *Bell* signified a change in Pennsylvania law as it related to disqualification and ultimately concluded that it did not. In both *Flood v. Bell*, 287 Pa. Super. 515, 430 A.2d 1171 (1981) and *Pittsburgh & New England Trucking Co. v. Reserve Insurance Co.*, 277 Pa. Super. 215, 419 A.2d 738 (1980), the Superior Court held that a trial court order refusing to disqualify counsel was interlocutory and unappealable in that such order did not preclude the parties seeking disqualification from proceeding with the actions in court. As it relates to federal litigation, the United States Supreme Court has resolved this question by concluding that the denial of a motion to disqualify is unappealable until final judgment of the underlying litigation. *Firestone Tire and Rubber Company v.*

Risjord, 449 U.S. 368 (1981). The Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania in this case have followed controlling law in deciding the Petition for Permission to Appeal.

The logic behind these decisions is clear as the denial of a motion to disqualify does not put a party out of court. In adopting the *Cohen* standard in *Bell*, the Supreme Court of Pennsylvania was sensitive to the same logic because members of a class were "put out of court" by dismissal of the class aspects of the underlying litigation.

The focus of any question of appealability is on whether or not the order in question precludes the party from proceeding with the action. In this matter, the Township is not precluded from going on with this action. The Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania properly recognized this and properly denied the Township's Petitions. Likewise, this Petition for Writ of Certiorari should be denied.

II. The Court did not deny due process by rendering its decision not to disqualify Hollinshead and Mendelson as counsel for Kenvue Development, Inc. and Kenvue Services Company without an evidentiary hearing.

The constitutional guaranty of due process declares that the government shall not deprive any person of life, liberty, or property without due process of law. It is beyond dispute that, in order to satisfy due process requirements, one must have notice and opportunity to be heard. Before due process is required, however, one must have a protected interest which is threatened. In this matter, the Township has no protected interest and is not entitled to due process protection. The Township claims that its interest is "fairness in judicial proceedings." Following this argument, the Township must believe that fairness can be taken away so long as the due process requirements of notice and opportunity to be heard are given. This cannot be and the Township cannot credibly advance such an argument.

Certainly, "fairness in judicial proceedings" is an important interest and one we all hold dear, but due process does nothing to protect this interest. Nor are due process requirements designed to protect this interest. Fairness is protected by mechanisms such as evidentiary and procedural rules, impartiality of judges and open access to the courts. Due process protects other interests which fall within the ambit of life, liberty and property and does not impact on this matter in anyway whatsoever.

The Township suggests that it was entitled to an evidentiary hearing to show the prejudice it would suffer if Hollinshead and Mendelson continues its representation of Kenvue Development, Inc. and Kenvue Service Company. Even if due process protection were to

be accorded in this instance, it is well settled that due process does not require a hearing in every conceivable case. *See, e.g.*, 16A Am. Jur. 2d, Constitutional Law, §845 and the cases cited therein. *See also, Pennsylvania Coal Mining Assn. v. Insurance Department*, 471 Pa. 437, 370 A.2d 685 (1977). Further, the Township never requested such a hearing. Procedurally, the Township waived its right to an evidentiary hearing when it chose to proceed by motion rather than by verified petition, which would have placed disputed factual matters before the court. It was satisfied to present its motion, replete with unverified allegations of fact and wait for a decision of the Court. Only when the decision was adverse, nearly one year after the motion was filed, was the Township heard to cry that its due process rights were violated. As both the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania denied the Petitions for Permission to Appeal in accordance with past decisions of the Pennsylvania Courts on this due process issue, the Township's instant Petition for Writ of Certiorari should also be denied.

III. The Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania recognized that the lower Court properly denied the Township's Motion and did not base its decision solely on the Doctrine of Laches.

The Township claims that its Motion was denied as barred by the Doctrine of Laches, that the Pennsylvania appellate courts acquiesced in an improper application of this doctrine and that this gives rise to a special and important reason to allow its appeal. The Township, however, fails to understand the trial court decision rendered by the Honorable Raymond L. Scheib. Contrary to the Township's interpretation of the Judge's opinion, Judge Scheib did not deny the Township's motion on the ground that it was barred by the Doctrine of Laches. Judge Scheib considered the Township's claims that Disciplinary Rules were violated, and found the claims to be unsupported. He also balanced those claims against the interests of Kenvue Development, Inc. and Kenvue Service Company and found that an extraordinary hardship would be visited upon them if their counsel were to be disqualified at this time. (Appendix to Petition for Writ of Certiorari, 6a). These considerations are in accordance with the law and the decision of Judge Scheib was a proper exercise of his discretion. *See, e.g., Freeman v. Kulicke and Soffa Industries,* 449 F. Supp. 974 (E.D. Pa. 1978), *aff'd* 591 F.2d 1334 (3d Cir. 1979); *American Dredging Co. v. Philadelphia,* 480 Pa. 177, 389 A.2d 568, 572 (1978) (competing interests of a party's choice of counsel and ethical administration of justice must be recognized); *Kramer v. Scientific Control,* 534 F.2d 185 (3d Cir. 1976) (hardship upon the party whose counsel would be disqualified is an important factor).

In his opinion, Judge Scheib noted that the Township knew of Mr. Ehmann's position with Hollinshead and Mendelson for 17 months but failed to question it. This unreasonable delay in bringing its Motion, was unexplained. (Appendix to Petition for Writ of Certiorari, 7a). Judge Scheib was cognizant of the warning of *Freeman*, that when a judge is faced with a Motion to Disqualify brought very late—with no explanation for the delay—tactical considerations may be a motivating force in bringing the motion. (Appendix to Petition for Writ of Certiorari, 7a).

When the Township stood by for 17 months while counsel for Kenvue Development, Inc., continued to prosecute this litigation and then, a mere *three* days before scheduled evidentiary hearing, raised a Motion to Disqualify, a question of motivation must arise. The Township's delay evinces a motive that is less concerned about enforcing the Code of Professional Responsibility than it is in gaining a tactical advantage.

The true import of Judge Scheib's decision was that the Township of Kennedy had not met the burden imposed on a party seeking the disqualification of its opponent's counsel. (Appendix to Petition for Writ of Certiorari, 7a). The party seeking disqualification "has the burden of establishing that counsel's continuing in the case would violate the disciplinary rules". *Zions First National Bank v. United Health Clubs*, 505 F. Supp. 183, 140 (E.D. Pa. 1981). Judge Scheib relied upon *Freeman, supra*, for the principle that "[v]ague assertions of prejudice will not serve to disqualify .... The prejudice that Ehmann's testimony would produce must be demonstrated, but Kennedy Township has failed to do so." (Appendix to Petition for Writ of Certiorari, 7a).

The Township of Kennedy alleged that to allow Hollinshead and Mendelson to continue to represent Kenvue Development, Inc., and Kenvue Service Company violates Disciplinary Rule 5-101(B). In support of this position, the Township quoted D.R. 5-101(B).

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness.

The Township, however, quoted only as much of the Rule as is favorable to its argument. The entire, accurate quote of DR 5-101(B) is:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Mr. Ehmann's potential testimony, which is wholly unnecessary, meets each of the relevant standards set forth in DR 5-101(B). (1) The testimony would relate to an uncontested matter (2) which is solely a formality and

no evidence will be offered in opposition. In their Petition for Appointment of Viewers, Kenvue Development, Inc., and Kenvue Service Company acknowledge the order of the D.E.R. and do not question the department's authority. The Township is seeking to rely on this order for the justification of taking without payment of just compensation. But the only question potentially before the lower Court is an interpretation of the plain language of the order—and that question is to be answered by a reading of the order. There is no need for testimony at all.

DR 5-101(B): (4) allows a lawyer to undertake employment and testify "[*A*]*s to any matter,* if the refusal would work a substantial hardship on the client because of the distinctive value . . . of his firm as counsel in that particular case". In this case, Hollinshead and Mendelson has represented the Petitioners on this matter for more than 15 years. The hardship on the client to now, on the eve of trial, seek new counsel would be extraordinary.

The Township of Kennedy further alleges a violation of Disciplinary Rule 9-101(B) which provides:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Mr. Ehmann did not accept employment in a matter in which he had "substantial responsibility". The matter of whether the Petitioners in the lower Court have the right to just compensation has no relationship whatsoever to the matter for which Mr. Ehmann had responsibility.

Mr. Ehmann, in his role at the D.E.R., participated in the cancellation of a sewage permit and the defense of that cancellation. At issue in this case is the amount of

compensation due as a result of the taking of Petitioners' property. Mr. Ehmann never had substantial, or any, responsibility in this matter. The issuance of a permit cancellation order, and most particularly the order at issue in this case, does not relate to the payment of just compensation. The Township of Kennedy cannot credibly seek to justify its taking of property *without the payment of just compensation* upon the order of the Department of Environmental Resources and cannot credibly seek to have the law firm which has represented the property owners for over 15 years disqualified based on the involvement of one employee of the law firm in his former role as a government attorney.

Further, Mr. Ehmann, since joining Hollinshead and Mendelson, had absolutely no involvement in the instant litigation. On these facts, there is no violation of Disciplinary Rule 9-101(B).

A clear reading of Judge Scheib's opinion concerning his Order of July 12, 1988 denying the Township's Motion for Disqualification shows no abuse of discretion. A review of the reasoning and cases cited by Judge Scheib further demonstrates that there is no substantial ground for difference of opinion. The Commonwealth Court of Pennsylvania acknowledged that an immediate appeal from the Order would not materially advance the ultimate termination of the case and denied the Township's Petition. The Motion to Disqualify, the Petition for Permission to Appeal to the Commonwealth Court of Pennsylvania, the Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, and now this Petition for Writ of Certiorari, are merely more delays in getting to the merits of this action, and only serve to unconscionably postpone the payment of just compensation to Kenvue Development, Inc. and Kenvue Service Company.

Conclusion

The Interlocutory Order denying the Motion to Disqualify Hollinshead and Mendelson does not satisfy the criteria established to justify an immediate appeal, thus the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania properly denied Kennedy Township's Petitions for Permission to Appeal. There are no special or important reasons to allow an appeal from those Orders and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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